



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16 and 52

[FAR Case 2017-020; Docket No. 2017-0020, Sequence No. 1]

RIN 9000-AN58

Federal Acquisition Regulation: Ombudsman for Indefinite Delivery Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a new clause for use in multiple-award indefinite-delivery, indefinite-quantity contracts that provides information on the task- and delivery-order ombudsman.

DATES: Interested parties should submit comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formulation of a final rule.

ADDRESSES: Submit comments in response to FAR Case 2017-020 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by entering "FAR Case 2017-020" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Comment Now" that corresponds with "FAR Case 2017-020." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2017-020" on your attached document.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street, NW, 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR case 2017-020" in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949. For information pertaining to status or publication schedules, contact the Regulatory

Secretariat Division at 202-501-4755. Please cite "FAR Case 2017-020."

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement a new clause that provides the agency task- and delivery-order ombudsman's responsibilities and contact information for use in multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. 10 U.S.C. 2304c and 41 U.S.C. 4106 require agencies to appoint or designate a task- and delivery-order ombudsman who is responsible for reviewing complaints from contractors and ensuring that all of the contractors are afforded a fair opportunity to be considered for the award of an order, consistent with the procedures in the contract.

To help implement the statutory requirement, FAR 16.504(a)(4)(v) requires the name, address, telephone number, facsimile number, and email address of the agency's task- and delivery-order ombudsman be included in IDIQ solicitations, if multiple awards may result from the solicitation, and multiple-award IDIQ contracts. As a result of the requirement at FAR 16.504, several agencies created an agency-level contract clause that provides this information to contractors. This rule provides a

standardized way to provide the necessary information to contractors with a single contract clause for use by all agencies.

II. Discussion and analysis.

This rule proposes to amend the FAR, as follows:

- FAR part 16 is revised to add a prescription that requires the use of the new clause in solicitations and contracts when a multiple-award, IDIQ contract is contemplated.
- FAR part 52 is revised to add a new clause at FAR 52.216-XX, Task-Order and Delivery-Order Ombudsman, that provides contractors with contact information (as a fill-in) for the agency ombudsman, explains the responsibilities of the ombudsman, and explains that contacting the ombudsman does not alter the timelines for other processes in the FAR.
- An Alternate I clause is added to the main clause for contracts used by multiple agencies. The Alternate I clause explains that for contracts used by multiple agencies, complaints from contractors concerning orders placed under multi-agency contracts are primarily reviewed by the task- and delivery-order ombudsman for the ordering agency and provides the

offeror with the contact information for the ordering agency's ombudsman.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule proposes to create a new FAR clause 52.216-XX, Task-Order and Delivery-Order Ombudsman. The objective of the rule is to implement a single clause available for use by all agencies when awarding multiple-award IDIQ contracts that provides contractors with the requisite information for the agency task- and delivery-order ombudsman.

DoD, GSA, and NASA plan to apply this clause to solicitations and contracts for the acquisition of commercial items, including COTS items, as defined at FAR 2.101. This rule does not impose any burden on contractors. Rather, this rule provides contractors with information on the responsibilities of and how to contact the ombudsman. Not applying this guidance to contracts for the acquisition of commercial items, including COTS items, could prevent some contractors from receiving the requisite information needed to address an issue with an agency's task- and delivery-order ombudsman. Consequently, DoD,

GSA, and NASA plan to apply the rule to contracts for the acquisition of commercial items, including COTS items.

The rule is not likely to apply to contracts at or below the SAT, since the value of multiple-award IDIQ contracts are usually above the SAT.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601 et seq. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) are proposing to revise the Federal Acquisition Regulation (FAR) to implement a new clause that provides the agency task- and delivery-order ombudsman's responsibilities and contact information for use in multiple-award indefinite-delivery, indefinite-quantity (IDIQ) contracts. 10 U.S.C. 2304c and 41 U.S.C. 4106 require agencies to appoint or designate a task- and delivery-order ombudsman who is responsible for reviewing complaints from contractors and ensuring that all of the contractors are afforded a fair opportunity to be considered for the award of an order, consistent with the procedures in the contract.

To help implement the statutory requirement, FAR 16.504(a)(4)(v) requires the name, address, telephone number, facsimile number, and email address of the agency's task- and delivery-order ombudsman be included in IDIQ solicitations and contracts, if multiple awards may result from the solicitation. As a result of the requirement at FAR 16.504, several agencies created an agency-level contract clause that provides this information to contractors. This rule provides a standardized way to provide the necessary information to contractors with a single contract clause for use by all agencies.

The objective of this proposed rule is to implement a single clause that provides contractors with the requisite information for the agency task- and delivery-order ombudsman and is available for use by all agencies when awarding a multiple-award IDIQ contract.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. According to data from the Federal Procurement Data System, there were 6,207 new multiple-award contracts awarded in fiscal year 2017. Of the 6,207 new awards, 4,477 (72 percent) of these actions were awarded to 3,873 unique small business entities. The proposed rule applies to all entities who do

business with the Federal Government and is not expected to have a significant impact on these entities, regardless of business size.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2017-020) in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 16 and 52

Government procurement.

Dated: October 29, 2018

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Billing Code: 6820-EP

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 16 and 52 as set forth below:

1. The authority citation for 48 CFR parts 16 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 16—TYPES OF CONTRACTS

16.504 [Amended]

2. Amend section 16.504 by removing paragraph (a)(4)(v) and redesignating paragraphs (a)(4)(vi) and (a)(4)(vii) as paragraphs (a)(4)(v) and (a)(4)(vi), respectively.

3. Amend section 16.506 by adding paragraph (j) to read as follows.

16.506 Solicitation provisions and contract clauses.

* * * * *

(j) Insert the clause at 52.216-XX, Task-Order and Delivery-Order Ombudsman, in solicitations and contracts when a multiple-award, indefinite-delivery, indefinite-quantity contract is contemplated. Use the clause with its Alternate I when the contract will be available for use by multiple agencies (e.g., Governmentwide acquisition contracts or multi-agency contracts). When placing orders under a contract available for use by multiple agencies,

the ordering agency's contracting officer shall complete paragraph (d)(2) and include Alternate I in the solicitation and any resulting order.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 52.216-XX to read as follows:

52.216-XX Task-Order and Delivery-Order Ombudsman.

As prescribed in 16.506(j), use the following clause:

TASK-ORDER AND DELIVERY-ORDER OMBUDSMAN (DATE)

(a) In accordance with 41 U.S.C. 4106(g), the Agency has designated the following task-order and delivery-order Ombudsman for this contract. The Ombudsman must review complaints from the Contractor concerning all task- and delivery-order actions for this contract and ensure the Contractor is afforded a fair opportunity for consideration in the award of task- or delivery-orders, consistent with the procedures in the contract.

(Contracting Officer to insert name, address, telephone number, and email address for the Agency Ombudsman or provide the URL address where this information may be found.)

(b) Before consulting with the Ombudsman, the Contractor is encouraged to first address complaints with the Contracting Officer for resolution. When requested,

the Ombudsman may keep the identity of the concerned party or entity confidential, unless prohibited by law or agency procedure.

(c) Consulting an ombudsman does not alter or postpone the timeline for any other process (e.g., protests).

(End of clause)

Alternate I. As prescribed in 16.506(j), add the following paragraph (d) to the basic clause.

(d) Contracts used by multiple agencies.

(1) This is a contract that is used by multiple agencies. Complaints from Contractors concerning orders placed under contracts used by multiple agencies are primarily reviewed by the task-order and delivery-order Ombudsman for the ordering agency.

(2) The ordering agency has designated the following task-order and delivery-order Ombudsman for this order:

(The ordering agency's contracting officer to insert the name, address, telephone number, and email address for the ordering agency's Ombudsman or provide the URL address where this information may be found.)

(End of clause)

